FILED
AUG 26 1942
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 339.

CITY OF NEW ROCHELLE,

Petitioner,

—against—

WESTCHESTER ELECTRIC RAILROAD COMPANY and NEW ROCHELLE RAILWAY AND TRANSIT COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

CHARLES S. RHYNE,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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OTHER AUTHORITY CITED:

Judicial Code as amended (U. S. C. A. Title 28, Section 344, Paragraph B):

Section 237 9

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Respondents.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the City of New Rochelle for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New York entered in the above entitled proceeding in the office of the Clerk of the County of Westchester on the 26th day of May, 1942 upon the remittitur of the Court of Appeals of the State of New York respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF FACTS, THE PROCEEDINGS AND THE DECISIONS BELOW.

Prior to the year 1900 the Village of New Rochelle granted certain consents to the respondents and their predecessors in interest to operate a trolley line along

certain streets within the Village. The consents so granted did not contain a period of time for which they were to continue.

Subsequent to the granting of the consents the Village was incorporated and became a city and succeeded to all of the rights and privileges of the Village.

At the time of the granting of the consents the population of the Village of New Rochelle was 8,217 as shown by the figures of the Bureau of Census of the Department of Commerce of 1890 (542-545). According to the last census the population of the City of New Rochelle was in excess of 60,000 (55).

When the original consents were granted the companies operating used the horse-car as a method of transportation. The electric trolley car was first introduced as a means of transportation in the early 90's (468) and the bus as a means of transportation was not known and did not make its appearance until 1914 (470).

By virtue of these changed conditions and other changes which will be noted hereafter and pursuant to its authority, the Council of the City of New Rochelle adopted a resolution (118-125) terminating the consents granted to the respondents and directing the respondent, Westchester Electric Railroad Company, to cease operating the "A" trolley line within sixty days after receipt of the notice. The resolution authorized the Corporation Counsel on behalf of the City of New Rochelle to commence an action in a court of competent jurisdiction upon the failure of the Westchester Electric Railroad Company to cease operating the aforesaid "A" trolley line. The respondent Company received a copy of said resolution and refused to comply therewith and accordingly this action was commenced.

This action was brought to have the Court declare the rights and legal relations between petitioner and respond-

ents under the aforesaid consents. The complaint sets forth four causes of action under which the petitioner contends it is entitled to have the Court declare that the respondents do not have the right to continue the operation of the trolley line commonly designated as the "A" line.

The Complaint.

Those portions of the complaint which are relevant upon this appeal are as follows:

The first cause of action alleges in part that the consent from the Trustees of the Village of New Rochelle to operate a trolley line along certain streets of the Village which is a part of the "A" line did not contain therein a period of time for which the consent was to continue (21); that the consent which was granted was terminated by the City of New Rochelle and a demand made upon the respondent, Westchester Electric Railroad Company to cease operating the aforesaid "A" trolley line; that the said consent did not grant permission to the respondent, Westchester Electric Railroad Company to operate a trolley line along certain streets in the Village, which is now a part of the "A" line (19-20).

The second cause of action alleges that the consents to operate a trolley line along certain streets in the Village of New Rochelle were granted to New Rochelle Street Horse Railroad Company, the New Rochelle Railway & Transit Company, New Rochelle and Pelham Railway Company and Westchester Electric Railroad Company and that the consents so granted did not contain a period of time for which they were to continue (26-50) and that all of the consents were terminated by the Council of the City of New Rochelle.

The third cause of action alleges that the consents in

question were granted many years ago when the population of the Village was approximately 9,000; that a substantial portion of the properties in the City were not then developed; that the automobile was not then used as a means of transportation; that the population of the City of New Rochelle in 1939 was in excess of 50,000; that the operation of the trolley along its present route constitutes a dangerous and hazardous condition and that the convenience of the City no longer requires the presence of the trolley car and in general that the continued operation of the "A" line constitutes a peril and danger to persons and property on the street; that transportation by means of street cars is not a modern means of transportation; that it has become out-moded and that it was not the intent of the Trustees of the Village of New Rochelle when the consents were granted that the said consents should continue beyond a reasonable time.

The fourth cause of action alleges in part that the consent granted to the Westchester Electric Railroad Company on March 7th, 1898 provided that if future Village improvements required the change of the grade or bed of the tracks that the Company was to make such changes without cost to the Village; that in 1931 the City of New Rochelle improved Rose Street (now North Avenue) by widening the same and the said improvement required the changing of the bed of the tracks along said street; that the Westchester Electric Railroad Company was duly requested to change the bed of its tracks at its own cost and expense but it failed and refused to do so unless it received some consideration, as a result of which the City was obliged to waive the assessment which was to be levied against the said Westchester Electric Railroad Company under the provisions of the Charter of the City of New Rochelle for the paving of Rose Street (now North Avenue).

Each one of the consents referred to in the second cause of action contains a portion of the route now operated by the respondent and it is by putting together these portions of the routes contained in the various consents that the respondent now contends that it has the right to operate the trolley line in question.

Decisions in Courts Below.

The issue was tried before Hon. Gerald Nolan, one of the Justices of the Supreme Court of the State of New York in the County of Westchester and a decision was rendered in favor of the respondent, Westchester Electric Railroad Company, dismissing the complaint insofar as it seeks an injunction restraining the operation of the aforesaid "A" trolley line (240-264) and judgment was entered in favor of the said respondent in the office of the County Clerk of Westchester County.

In his opinion in the Court below (817-830) Judge Nolan held that although the franchises in question were unlimited as to the term or duration, that said franchises constituted property and when once granted cannot be taken away save by the terms therein prescribed or by due process of law; that the resolution of the Council of the City of New Rochelle terminating such franchises did not constitute due process and that under the settled law of the State the respondent had a property right in said franchises from the enjoyment of which it could not be excluded without compensation; that if public interest required the termination of the franchises, the result could be accomplished by purchase or condemnation.

Upon appeal to the Appellate Division of the Supreme Court of the State of New York the judgment was affirmed without opinion.

An appeal by permission of the Court of Appeals was

thereupon taken to the Court of Appeals of the State of New York where the judgment was again affirmed without opinion.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

A. It is for this Honorable Court alone to determine:

1. Whether a consent granted by a municipality unlimited as to time or duration, may not be terminated at will by the municipality granting the same.

2. Whether the use of public streets can be permanently parted with by a municipality in favor of private interests.

3. Whether a municipality, in view of the changed conditions since the granting of a consent, can terminate the same upon the ground that the continued operation under the consent is a hazard and constitutes a peril and danger to persons and property.

B. In the case of *Blair* v. *Chicago*, 201 U. S. 400 decided by this Honorable Court, the Court held that a consent of a municipality to a utility company without limitation as to time did not amount to a franchise in perpetuity.

C. The case of *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, decided by this Honorable Court involved a grant to a gas company of the right to use the streets of a municipality for the laying of its pipes and the Court held that the Company did not acquire any specific location in the streets and laid the pipes at the risk that they might at some future time be disturbed when the State might require for a necessary public use that changes be made.

D. The Court below based its decision on the case of *People* v. *O'Brien*, 111 N. Y. 1, decided by the Court of Appeals of the State of New York in 1888 and it is respectfully submitted that the decision in the case of *People* v. *O'Brien* is not in accord with the applicable decisions of this Honorable Court and that the decision and judgment of the Court below was thereby rendered to the damage and detriment of your petitioner.

The case at bar is of extreme importance inasmuch as it involves the question as to whether or not a municipality can permanently part with the use of the public streets in favor of private interests when in the course of years it appears that such use of the streets is being made to the damage and detriment of the people of the City.

It is submitted that the Court below erred in holding that inasmuch as the consent was silent as to time or duration, such silence was deemed to be the granting of a perpetual franchise. It is submitted that the Court below thereby construed the consent in favor of private interests as against the interest of the people of the City and that where two meanings can be applied to a consent that the consent should be construed in favor of the people as against private interests; that where a private interest takes a consent without a limitation of time it takes it at its own risk, subject to a revocation at will by the municipality. In construing a consent which is silent as to time or duration the Court should, applying the principle of "The greatest good for the greatest number" construe said franchise in favor of the people as against the private interest.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court directed to the Special Term of the Supreme Court of the State of New York commanding that Court to cer-

tify and send to this Court for its review and determination a full and complete transcript of all proceedings in the above entitled case and that the judgment therein entered on the 26th day of May, 1942 upon the remittitur of the Court of Appeals of the State of New York be reversed by this Court and that your petitioner may have such further relief as this Court may deem proper.

And your petitioner will ever pray.

Dated: August 21, 1942.

CITY OF NEW ROCHELLE,
By AARON SIMMONS,
Director of Law of the City of New Rochelle
and Corporation Counsel.

CHARLES S. RHYNE,
Counsel for Petitioner.